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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ESTATE OF DAVID BURKHART,) No. C 07-5467 PJH
Plaintiff,)
v.)
UNITED STATES DEPARTMENT OF)
VETERANS AFFAIRS; and DOES 1 to 50)
inclusive.)
Defendants.)
**FEDERAL DEFENDANT'S REPLY IN
SUPPORT OF MOTION TO DISMISS**
Date: May 28, 2008
Time: 9:00 a.m.
Courtroom 3, 17th Floor

Plaintiff has provided no legal basis for denial of defendant's motion to dismiss the United States Department of Veterans Affairs ("VA") in this Federal Tort Claims Act ("FTCA") action. A court should grant a Federal Rule of Civil Procedure 12(b)(6) motion where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Here, plaintiff fails to allege a cognizable legal theory against the VA. Plaintiff's tort claims of medical malpractice and negligence are brought pursuant to the FTCA. *See* 28 U.S.C. §§ 2674, 2679. Under the FTCA, the only proper defendant is the United States, not the VA, an agency. To the extent plaintiff attempts to allege an FTCA claim against anyone other than the United States, her claim should fail. *See* 28 U.S.C. § 2679; *Woods v. United States*, 720 F.2d

1 1451, 1452 n. 1 (9th Cir. 1983). Thus, the United States should be substituted in place of the
2 VA. 28 U.S.C. § 2679(a); *Allen v. Veterans Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984).

3 Defendant respectfully request that the Court grant its motion to dismiss.

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5 Respectfully submitted,

6 JOSEPH P. RUSSONIELLO
7 United States Attorney

8 /s/
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10 Dated: May 14, 2008

11 JENNIFER S WANG
12 Assistant United States Attorney

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